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Supreme Court, U.S.
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NO. 89-5999

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANNY SMITH,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. DOES A FOURTH AMENDMENT SEIZURE OCCUR WITHOUT AN INTENTIONAL GOVERNMENTAL TERMINATION OF A PERSON'S FREEDOM OF MOVEMENT?

II. MAY A LAW ENFORCEMENT OFFICER APPROACH A CITIZEN ON THE STREET WITHOUT SEIZING THAT PERSON FOR FOURTH AMENDMENT PURPOSES?

III. DOES THE FOURTH AMENDMENT PROTECT PROPERTY WHICH HAS BEEN DISCARDED OR ABANDONED DURING A STREET ENCOUNTER BETWEEN A PLAIN CLOTHES POLICE OFFICER AND A PERSON WHERE THE OFFICER DOES NOTHING MORE THAN IDENTIFY HIMSELF, ASK A QUESTION OF THE PERSON AND THE PERSON APPROACHED DOES NOT FEEL THAT HE HAS BEEN RESTRAINED IN ANY WAY?

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OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported in 45 Ohio St. 3d 255 (1989). Errata in the official advance sheets have been corrected and the corrected opinion reported in 544 N.E. 2d 239. In addition, the opinion is adequately set forth in the petition. The opinions of the Ohio Court of Appeals for the Fifth Appellate District and the opinion of the trial court, the Court of Common Pleas for Ashland County, Ohio are adequately set forth in the petition.

JURISDICTION

Jurisdiction is claimed by petitioner under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fourth and Fourteenth Amendments are adequately set forth in the petition.

STATEMENT OF THE CASE

Petitioner Smith was charged by grand jury indictment with one count of drug abuse, a possessory offense, in violation of Ohio Revised Code 2925.11(A). Petitioner had been observed by two Ashland, Ohio undercover police officers as he and a companion exited the home of Wilma Balducci, a third party suspected of involvement in illegal drugs. Balducci was on probation following a felony conviction for forgery. At the time, officers were aware that a search warrant had been executed at Balducci's home resulting in the seizure of drug paraphernalia. In addition, the officers had received tips from informants that Balducci had been dealing in drugs and had purchased property for cash and drugs. Neighbors had complained of heavy traffic in and out of Balducci's residence. As the officers watched, petitioner crossed the street carrying in one hand a grocery bag with the top rolled over. Petitioner carried the bag "gingerly", with his right hand held low as if to avoid moving the contents. The officers had previously observed persons carrying illegal drugs in a similar fashion.

In an unmarked car, the plain clothes officers followed petitioner as he walked toward a parking lot. One officer called to petitioner, asking him to "come here a minute." Petitioner did not respond and continued walking. After parking the car, the officer identified himself. Petitioner continued on, threw the bag on the hood of a car, then turned and stepped away from the bag. The plain clothes officer approached the bag which petitioner had thrown on the car hood. As he reached for the bag, petitioner attempted to block the officer's hand. The bag was opened disclosing a set of scales, a paper wrapping used to package cocaine and some white powder. When the officer asked petitioner how much cocaine was in the bag, petitioner replied that it contained two grams of the drug. Petitioner was arrested at that point.

Petitioner moved to suppress the contents of the bag on Fourth Amendment grounds. Respondent urged, inter alia, there was no seizure of petitioner until after the contents of the bag had been

discerned. Respondent argued that when petitioner threw the bag toward the car and stepped away, petitioner no longer had a reasonable expectation of privacy in the bag or its contents.

The trial court found as historic fact that there was no seizure of petitioner during the initial encounter and that petitioner had thrown the bag away from himself and stepped away from it as the officer approached. The state court of appeals concluded that by throwing the bag and stepping away from it, petitioner had attempted to disassociate himself from the bag, and therefore did not retain a reasonable expectation of privacy in its contents.

The Ohio Supreme Court upheld the seizure of the bag on other grounds. The court did not adhere to the finding of abandonment reached by the lower courts but concluded that there was a reasonable, articulable basis for seizure of the bag and examination of the bag was necessary to avoid destruction of its contents.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE WAS NO FOURTH AMENDMENT SEIZURE OF PETITIONER UNTIL PROBABLE CAUSE FOR ARREST HAD DEVELOPED.

Not all police encounters with citizens amount to a seizure of the person. Terry v. Ohio, 392 U.S. 1 (1968). A person is seized for Fourth Amendment purposes "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 555 (1980).

The test assesses the coercive effect of police conduct, taken as a whole, rather than focusing on particular details in isolation. Michigan v. Chesternut, 486 U.S. 569, (1988). A Fourth Amendment seizure occurs only when there is governmental termination of freedom of movement through means intentionally applied. Brower v. County of Inyo, 489 U.S. ___, 109 S. Ct. 1378 (1989).

Testifying at the hearing on his motion to suppress evidence, petitioner agreed that when the officer called to him, he felt free to continue walking. This was true even after the officer had identified himself. The plain clothes officer did not present weapons, use a threatening tone of voice or display any other indicia that petitioner was not free to continue on his way. The state courts reached this conclusion. Petitioner was not seized until after probable cause for his arrest had developed.

2. THERE WAS REASONABLE ARTICULABLE SUSPICION TO SUPPORT THE OFFICER'S APPROACH OF PETITIONER.

The principles announced in Terry v. Ohio, 392 U.S. 1, (1968), permit investigative intervention with a citizen's freedom of movement upon reasonable suspicion of criminal activity. The reasonableness of the intrusion must be viewed through the eyes of a trained law enforcement officer who may draw inferences an untrained civilian would miss. United States v. Cortez, 449 U.S. 411 (1981). The assessment of the reasonableness of such an intrusion must be based upon all of the circumstances. United States v. Sokolow, __ U.S. ___, 109 S.Ct. 1581 (1989)

In petitioner's case, the undercover officers had a legitimate basis for suspecting that petitioner was engaged in unlawful activity. Petitioner was observed leaving a house in which drug paraphernalia had been discovered pursuant to a search warrant. Informants and neighbors respectively had advised law enforcement officers that Balducci was a drug dealer and that there was a high level of traffic in and out of the house. Petitioner was carrying a rolled down paper bag in a manner in which the experienced undercover officers had observed narcotics carried in past investigations. There were sufficient articulable reasons to support a reasonable suspicion that petitioner was engaged in criminal activity thereby permitting the officers to approach and seek to temporarily detain the bag. Law enforcement officers may rely on the behavior of a suspect who appears to be evading police contact. United States v. Brignoni-Ponce, 422 U.S. 873 (1974).

3. BY THROWING THE PAPER BAG AND STEPPING AWAY AS OFFICERS APPROACHED, PETITIONER NO LONGER HELD A REASONABLE EXPECTATION OF PRIVACY IN THE BAG OR ITS CONTENTS.

No Fourth Amendment seizure of petitioner had occurred when the plain clothes detective approached petitioner and identified himself as a police officer. Michigan v. Chesternut, supra. When petitioner discarded the bag and contents as the officer approached, the officer was free to take the object into his possession. Hester v. United States, 265 U.S. 57 (1924).[1] No command was given which might have caused petitioner to relinquish the bag.

That which is abandoned is no longer protected by the Fourth Amendment. See e.g., Abel v. United States, 362 U.S. 217 (1960). Abandonment is a question to be determined from all of the circumstances. Such determination by the trier of fact should be accorded deference by a reviewing court. Petitioner's act of throwing the bag and disassociating himself from it as Officer

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[1] The trial court as trier of fact specifically found that petitioner threw the bag away from himself and stepped away. These findings of historic fact are entitled to great deference by reviewing courts. See Sumner v. Mata, 449 U.S. 539, (1981).

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AFFIDAVIT OF SERVICE

State of Ohio,
County of Ashland, SS:

Robert P. DeSanto, being first duly sworn says that he is eligible and has made application for admission to the Bar of the Supreme Court of the United States; that he is counsel for respondent in the above captioned case, SMITH v. OHIO, No. 89-5999; that pursuant to Rule 28.5(C) of the Rules of Practice of this Court, affiant served a copy of the foregoing Respondent's Brief in Opposition upon petitioner, Danny Smith, by mailing a copy to the office of petitioner's counsel of record, Max Kravitz, at his place of business, Capital University Law School, 665 South High Street, Columbus, Ohio 43215, by United States Mail, First Class, postage prepaid on the 19th day of December, 1989.

Further, affiant states that all parties required to be served have been served.

Robert P. DeSanto
Prosecuting Attorney

SWORN to before me and subscribed in my presence this 19th day of December, 1989.

Notary Public

My Commission Expires 7-25-93.

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AFFIDAVIT OF MAILING

State of Ohio,
County of Ashland, SS:

Robert P. DeSanto, being first duly sworn says that he is eligible and has made application for admission to the Bar of the Supreme Court of the United States, that he is counsel for respondent in the above captioned case, SMITH v. OHIO, No. 89-5999; that pursuant to Rule 28.2 of the Rules of Practice of this Court, on December 14th, 1989, affiant caused ten (10) copies of the Respondent's Brief in Opposition to be deposited in the United States Post Office, Ashland, Ohio, with first class postage prepaid, addressed to the Clerk of the Supreme Court of the United States. Further that respondent was served with a copy of the petition on November 20, 1989 and to affiant's knowledge, this mailing was done within the permitted time for the filing of Respondent's Brief in Opposition.

Robert P. DeSanto
Prosecuting Attorney

SWORN to before me and subscribed in my presence this 14th day of December, 1989.

Notary Public

My commission expires 7-1-93

Thomas approached was properly viewed by the trial court as an abandonment of petitioner's privacy interest therein.[2] Hester v. United States, supra. No Fourth Amendment seizure of either petitioner or the bag took place. See Michigan v. Chesternut, supra and Brower v. County of Inyo, supra.

It is respectfully submitted that the writ of certiorari should not issue in this case.

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[2] Both the trial and intermediate appellate courts reached this conclusion. The Ohio Supreme Court declined to adhere to the view taken by the lower courts. However, respondent is free "to defend its judgement on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by (the lower courts)." Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Respondent has consistently urged abandonment in the courts below.

CONCLUSION

No unreasonable search or seizure within contemplation of the Fourth Amendment took place below. For the reasons advanced, respondent respectfully requests that the writ of certiorari not issue in this case.

Respectfully submitted,

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